Supreme Court, U.S.
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No. 021148

Supreme Court of the United States

WILMER KEITH BRECKENRIDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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58 pp

QUESTION PRESENTED

1. **Whether the panel decision from the Eleventh Circuit, finding no "plain error" existed in the face of a clear *Apprendi* violation, runs afoul of the U.S. Constitution and conflicts with both Supreme Court and Eleventh Circuit precedent and violates fundamental constitutional rights under the Fifth and Sixth Amendments.**

LIST OF ALL PARTIES

Pursuant to Supreme Court Rule 14.1, the undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of court:

1. **BEDWELL**, Gloria A.
   A.U.S.A./Trial and Sentencing Counsel for Appellee

2. **BRECKENRIDGE**, Wilmer Keith "Sonny"
   Defendant/Appellant/Petitioner

3. **BUTLER**, Honorable Charles R., Jr.
   United States District Court Judge

4. **KIMBROUGH**, William
   Trial and Sentencing Counsel for Petitioner

5. **LOFTON**, Richard
   A.U.S.A./Trial and Sentencing Counsel for Appellee

6. **SHEIN**, Marcia G.
   Appellate Counsel for Petitioner Breckenridge

7. **TOMPKINS**, Thomas M.
   Sentencing Counsel for Petitioner Breckenridge

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

There are no identifiable victims as to the offenses of conviction.

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No. _____

In The
Supreme Court of the United States

WILMER KEITH BRECKENRIDGE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit
Appellate Case No. 98-6008

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a *writ of certiorari* issue to review the decision rendered by the Eleventh Circuit Court of Appeals on September 4, 2002, as well as the Eleventh Circuit's Order of November 8, 2002, which denied a rehearing en banc.

This case presents a conflict of laws as applied to the United States Constitution. **United States v. Cotton** is squarely in conflict with the Eleventh Circuit

decision as applied to the constitutional questions that **Apprendi v. New Jersey** was meant to decide.

OPINION BELOW

The opinion by the Eleventh Circuit was a per curiam, unpublished opinion. As such, there exists no formal citation for said opinion. Reference to the opinion is thereby limited to the following: **United States v. Lipscomb**, No. 98-6008 (11th Cir. September 4, 2002) (unpublished) (per curiam), *rehearing denied*, No. 98-6008-II (11th Cir. November 8, 2002). (App. 29)

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Eleventh Circuit Court of Appeals on September 4, 2002, as well as the Eleventh Circuit's Order of November 8, 2002, which denied a rehearing en banc.

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate as the Eleventh Circuit is believed to have entered a decision which is in conflict with the United States Constitution, as well as with the decisions of the Supreme Court and Eleventh Circuit precedent.

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS INVOLVED

After review of the record, and the panel decision, it is the opinion of the undersigned counsel that the decision of the panel, in regard to the finding that no "plain error" existed for purposes of applying *Apprendi* to the sentence, conflicts with the decisions of both the Supreme Court and Eleventh Circuit, to wit:

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000);

United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 1786, 152 L.Ed.2d 860 (2002);

United States v. Anderson, 289 F.3d 1321, 1326 (11th Cir. 2002);

United States v. Rogers, 228 F.3d 1318, 1327 (11th Cir. 2000).

Additionally, the issue presented involves the following Constitutional provisions:

> **Fifth Amendment** - "No person shall be... deprived of life, liberty, or property, without due process of law."

Finally, the issue presented involves Rule 52(b) of the Federal Rules of Criminal Procedure. According to said Rule, and Supreme Court interpretation, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" **United States v. Johnson**, 520 U.S. 461, 466-67, 137 L.Ed.2d 718, 117 S. Ct. 1544 (1997) (quoting **United States v. Olano**, 507 U.S. 725, 732, 123 L.Ed.2d 508, 113 S. Ct. 1770 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.

STATEMENT OF THE CASE

Pursuant to an investigation into cocaine trafficking in Southern Alabama, Petitioner, a deputy sheriff in Marengo County Alabama, was alleged to have been receiving "pay-offs" from drug dealers in return for allowing drug sales to continue. Petitioner was also alleged to have used these drug dealers to sell drugs, which he provided, in return for a share of the proceeds.

Based upon the aforementioned investigation, Petitioner, along with numerous codefendants, was named in a 75-Count Superseding Indictment. Specifically, Petitioner was charged as follows: Count 2 - Conspiracy to Possess with Intent to Distribute more than 10 kilograms of crack, violating 21 U.S.C.

§§841(a)(1) and 846; Count 3 - Conspiracy to Possess with Intent to Distribute more than 50 kilograms of marijuana, violating of 21 U.S.C. §§841(a)(1) and 846; Counts 13, 23, 26 thru 28, 30, 31, 33, 36, 40, 44, 66, 69 - Possession with Intent to Distribute amounts of crack cocaine, violating 21 U.S.C. §§841(a)(1); Count 14 - Possession with Intent to Distribute one-eighth of a kilogram of cocaine, violating 21 U.S.C. §§841(a)(1); Counts 24, 73 - Possession with Intent to Distribute amounts of marijuana, violating 21 U.S.C. §§841(a)(1); Count 67 - Attempt to Possess with Intent to Distribute one ounce of crack, violating 21 U.S.C. §§841 and 846.

Trial commenced on August 4, 1997. During trial, the first mention of Petitioner came from Cedric Jones (Cedric). According to this witness, he was approached in 1995 by a Deputy Pickens, and a meeting was set up in Selma, Alabama. At the scheduled meeting, Petitioner was with Pickens. Cedric said that Pickens and Petitioner produced an arrest warrant, and told him to either cooperate or go to jail. Cedric said Pickens and Petitioner wanted $2000 per month, but it was later decided that Cedric would pay only $1000. The first payment was alleged to have been in November, 1995. The last was said to have been in December, 1996.

Subsequently, Pickens and Petitioner allegedly met with Cedric and provided 1-2 ounces of crack cocaine. According to Cedric, he sold the crack, and gave Petitioner $700 of the proceeds. Later, Petitioner and Pickens supposedly met with Cedric and discussed the acquisition of ten pounds of marijuana.

Pickens testified that this 10-pound marijuana deal called for $8000. Pickens said that he got $4000 from Petitioner. Pickens said Petitioner were going to use Cedric to distribute the marijuana once it was received. Pickens also said that Cedric was not the only person paying for protection, but that Billy Treadwell and Ed Lofton were paying as well. Pickens testified that Petitioner gave Lofton and Cedric crack cocaine, on various occasions, to sell.

After the presentation of the defense cases, and the giving of all closing arguments, the district court instructed the jury. During these instructions, there was nothing mentioned in regard to the jury having to make a determination on the amount of drugs. In fact, the jury was instructed that "*[t]he evidence in this case need not prove the actual amounts of the controlled substance that was part of the alleged conspiracy, or attempt, or the exact amount of the controlled substance alleged in the indictment of possessing with intent to distribute by the defendant*". There were no objections to the charges given. On August 25, 1997, Petitioner was found guilty as to Counts 2, 3, and 73, and acquitted of the charges in Counts 13, 24, 28, 30, 33, 36, and 40. Charges not part of the verdict were dismissed, pursuant to government motion, on August 20, 1997.

Petitioner appeared for sentencing on December 12, 1997. His objections challenged (i) the drug quantity; (ii) a two-point firearm enhancement; (iii) a two-point adjustment for abuse of trust; (iv) a three-point role adjustment; (v) a three-point adjustment for obstruction of justice; and (vi) the disparity of the crack and powder cocaine punishments.

First, the district court denied the disparity argument. As to the issue of drug quantity, the court found Petitioner accountable for at least 1.5 kilograms of "crack" cocaine. As such, a Base Offense Level of 38 was applied to Petitioner.

The district court also found that Petitioner had supervised Pickens and, therefore, found that the three-point role adjustment was applicable. The court also overruled Petitioner's objections as to the "abuse of trust" and "obstruction" enhancements. With a Total Offense Level of 43, a mandatory "life" sentence was imposed upon Petitioner.

A timely Notice of Appeal was filed for Petitioner on October 6, 1998, pursuant to a motion under Federal Rules of Appellate Procedure Rule 4(b), from the final judgment rendered in the Southern District of Alabama. Jurisdiction in the Eleventh Circuit Court of Appeals, was proper pursuant to Title 28 U.S.C. §1291 and Title 18 U.S.C. §3742(a)(1).

Petitioner's appellate brief set forth five issues for review by the Eleventh Circuit, including the argument that the district court erred in determining the amount of drugs attributable to the offense, as the sentence imposed was contrary to the decision in **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

After hearing oral arguments on the issues presented, a panel for the Eleventh Circuit issued an opinion dated September 4, 2002. In said opinion, and in relation to the *Apprendi* issue, the panel cited to the Supreme Court decision in **United States v. Cotton**,

535 U.S. 625, 122 S. Ct. 1781, 1786, 152 L.Ed.2d 860 (2002). In so doing, and without any analysis of the trial record, the panel stated that Petitioner had failed to show "plain error" existed as to the *Apprendi* claim. The panel denied Petitioner's *Apprendi* argument, as well as al other issues raised on appeal, and affirmed the convictions and the "life" sentence.

Petitioner then sought an en banc review of the panel's decision. In the Petition for En Banc Review, Petitioner specifically challenged the panel's application/interpretation of *Cotton*, as well as the panel's finding that no "plain error" existed in this case. The Eleventh Circuit denied the request for en banc review on November 8, 2002.

As this Petition for Writ of Certiorari is timely submitted, the issues herein are properly before this Honorable Court and should be heard as this case affects a large group of criminal defendants' constitutional rights.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS PETITION FOR *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE PANEL DECISION FROM THE ELEVENTH CIRCUIT, FINDING NO "PLAIN ERROR" EXISTED IN THE FACE OF A CLEAR *APPRENDI* VIOLATION, RUNS AFOUL OF THE U.S. CONSTITUTION AND CONFLICTS WITH BOTH SUPREME COURT AND ELEVENTH CIRCUIT PRECEDENT AND VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

Argument

At issue in Petitioner's case is whether his life sentence was such a gross infringement upon his due process rights that it constituted a miscarriage of justice, in violation of *Apprendi*, thereby warranting remand for resentencing. The major thrust of this issue is that, because the drug quantity allegedly attributable to Petitioner was neither submitted to the jury, nor proven beyond a reasonable doubt, a sentence over twenty (20) years was not available to be imposed. Based on the information and arguments below, it is asserted that there exists a significant constitutional question associated with this issue and, and such, it is respectfully requested that Petitioner's Writ of Certiorari be issued.

A. *Apprendi* Decision

In **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court was faced with a sentencing judge's finding that racial animus motivated Apprendi's weapons offense, thereby triggering application of a state "hate crime enhancement". Said "enhancement", in turn, doubled the maximum authorized sentence. The Supreme Court held that the sentence enhancement violated Apprendi's right to a jury determination as to whether he was guilty of every element of the crime with which he was charged, beyond a reasonable doubt. Such a right was said to have attached not only to the weapons offense, but also to the aggravating circumstance. The dispositive question, according to the Supreme Court, was one of effect - not form. If a State increases a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt. Through its decision in *Apprendi*, the Supreme Court established, as a new rule of constitutional law, that facts which increase the statutory maximum, other than prior convictions, must be submitted to the jury, and proven beyond a reasonable doubt. *See Apprendi*, 120 S.Ct. at 2362-63.

After the *Apprendi* decision, various Circuit Courts, including the Eleventh Circuit, held that, because the sentencing schemes under 21 U.S.C. §841(b) set forth a variety of statutory maximums, the "*Apprendi* Rule" applies to sentences under 21 U.S.C. §841. *See e.g.*, **United States v. Rogers**, 228 F.3d 1318 (11th Cir. 2000); **United States v. Doggett**, 230 F.3d 160

(5th Cir. 2000); **United States v. Aguayo-Delgado**, 220 F.3d 926 (8th Cir. 2000);**United States v. Flowal**, 234 F.3d 932 (6th Cir. 2000).

B. *Cotton* Decision

Petitioner is also aware of the plethora of "modifications" which courts are trying to have worked to somewhat limit the overall applicability of *Apprendi* since its publication, including the most recent in **United States v. Cotton**, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002).

In *Cotton*, as the indictment did not allege the amount of the controlled substances charged, the Supreme Court answered in the negative the question of "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." *Cotton*, __ U.S. __, 122 S.Ct. at 1783.

While the Supreme Court initially addressed this case as a jurisdictional question, by reasoning that earlier decisions which considered indictment defects jurisdictional were no longer applicable, the Court then proceeded to apply the "plain error" test to *Cotton*'s claim.

After concluding that the error in the indictment, (failing to allege a specific quantity) did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, because of the "overwhelming" and "essentially uncontroverted"

evidence would have led the grand jury to find the requisite drug amounts, *Cotton*, __ U.S. __, 122 S.Ct. at 1786, the Court reversed the Fourth Circuit's decision that limited the defendants' sentences to 20 years. *Cotton*, __ U.S. __, 122 S.Ct. at 1787. According to the Supreme Court, "the real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [the defendant], despite the overwhelming and uncontroverted evidence that [he was] involved in a vast drug conspiracy, [was] to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." *Id.*

C. Petitioner's case

On direct appeal, Petitioner asserted that the decision of **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), was applicable to his case and, as such, any sentence over the twenty-year statutory maximum in 21 U.S.C. §841(b)(1)(C) constituted "plain error". Contrary to the decision of the Eleventh Circuit Panel, "plain error" was established, thus warranting relief under *Apprendi*. With there being no dispute that an *Apprendi* error existed in this case, nor that said error affected Petitioner's substantial rights, Petitioner respectfully challenges the Eleventh Circuit Panel's finding that "plain error did not exist", and the determination that "there was no basis for concluding that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, because the evidence on that relevant matter was overwhelming and essentially uncontroverted".

1. **The holding in United States v. Cotton, as well as the interpretation and application of said holding in the lower courts, negates the protections afforded a criminal defendant under the provisions of the Constitution.**

As set forth above, the Eleventh Circuit cited to **United States v. Cotton**, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), in denying Petitioner relief. It is respectfully submitted that the procedure for plain error review, as set out in *Cotton*, along with the interpretation and application in the lower courts, are contrary to the Constitutional safeguards provided to criminal defendants, as it places more importance on the perceived fairness of the judicial proceedings than the rights set forth in the Constitution. Any other interpretation negates the purpose of *Apprendi* and disparently impacts defendants who go to trial.

Pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" **United States v. Johnson**, 520 U.S. 461, 466-67, 137 L.Ed.2d 718, 117 S.Ct. 1544 (1997) (quoting **United States v. Olano**, 507 U.S. 725, 732, 123 L.Ed.2d 508, 113 S.Ct. 1770 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (internal quotation marks omitted) (quoting *Olano*, 507 U.S. at 732).

The *Cotton* holding does not impact the the substantive conditions in the "plain error" analysis, but deals directly with the exercise of the courts' discretion in dealing with the "plain error" after such an error has been established. The holding in *Cotton*, and subsequent adherence thereto, clearly places Constitutional safeguards in peril. This is especially so when the "plain error" involves an *Apprendi* violation.

Under *Apprendi*, a criminal defendant has a right to a jury determination as to whether he was guilty of every element of the crime with which he was charged, beyond a reasonable doubt. When no such jury determination is afforded the defendant, and the defendant is subjected to a more severe punishment, it logically follows that there is an *Apprendi* violation. This "violation" does not represent some minor error in the proceedings, but goes directly to the deprivation of a defendant's Constitutional rights, whether under the due process clause or the Sixth Amendment, or both.

Additionally, the *Apprendi* violation in Petitioner's case does not represent some "forfeited error" that was alleged to have been overlooked at trial. Instead, *Apprendi* set forth new Constitutional safeguards for the criminal defendant, which clearly became applicable to Petitioner's case through exercise of law. *See* **Griffith v. Kentucky**, 479 U.S. 314, 328 (1987) (Supreme Court decision is "applied retroactively to all cases . . . pending on direct review or not yet final").

In the "plain error" analysis offered by *Cotton*, the courts find that the constitutional right, under *Apprendi*, to have been violated, but are then simply allowed to disregard the constitutional violation through an arbitrary and subjective determination as to whether the evidence against a given defendant is "overwhelming" and "essentially uncontroverted", thus, in effect, taking the position of jurors and and depriving a Defendant of a fair trial. The clear problem, and one which erodes the Constitutional safeguards of *Apprendi*, is that there exists no reliable "measuring stick" to adequately determine what constitutes "overwhelming" and "essentially uncontroverted" evidence to be determined by a judge, not a jury.

During trial, the government presents evidence from known drug dealers, by way of cooperation agreements. Said individuals are often noted liars, and if not, certainly have the motivation to become liars. Without the benefit of any corroborating evidence, the testimony of these individuals is taken as the "gospel" truth. Does this mean that the evidence is "overwhelming"? The answer is clearly no. It is practically impossible for a defendant to show these individuals are spouting untruths as, in many cases, there exist no other "disinterested" parties with knowledge of what actually transpired. As such, defendants are at the mercy of their deal-making cohorts.

Given the relative ease at which juries, and courts, choose to accept the stories told by those who strike deals with the government, the next question

becomes what constitutes "essentially uncontroverted" evidence. Again, in the absence of any disinterested parties, the issue comes down to the testimony of the government's witnesses versus the word of the defendant. In such a situation, the defendant has little or no chance of avoiding the underlying "bias" that presents itself to all criminal defendants. In spite of specific jury instructions to judge the evidence fairly, it is of little consequence that a jury swears to hear the case with an unbias ear, as any testimony provided by the defendant is always characterized as being "self-serving". As such, any testimony from the defendant becomes a "lesson in futility", as it is seldom deemed credible - and if it is credible, it is given is given little, if any, weight. With the prevailing underlying "bias" against the criminal defendant, just how far is such a defendant expected to go to be deemed "essentially controverting" the evidence.

Cotton derails the very purpose of the *Apprendi* decision itself, to wit: to ensure a criminal sentence is based on factors which are proven to be true, by the jury, beyond a reasonable doubt. *Cotton* puts the courts back in the same position they were in prior to *Apprendi*, to wit: - having the authority to evade the provence of the jury, which was to find drug quantity beyond a reasonable doubt, and substitute the court's opinion as to the drug quantity the jury might have found had it been presented the opportunity.

Given the arbitrary and subjective nature of the terms "overwhelming" and "essentially uncontroverted", it is submitted that such factors are totally deficient to eradicate a clear constitutional

violation. Yet, the courts appear willing to embrace the deprivation of a defendant's constitutional rights as long as the perception of "fairness" of their proceedings was not impacted. This is placing the emphasis in the wrong place. It is strictly the province of the jury to determine an element of the offense that enhances the sentence.

Apprendi calls for the aggravating punishment factor (drug quantity in this case) to have been submitted to the jury, and proven beyond a reasonable doubt. When this does not happen, it runs afoul of the provisions of the Constitution to apply the aggravating factors to the defendant. A court proceeding *cannot* be deemed to be fair, or have its integrity upheld, where there exist admitted errors, and said errors are admitted to have substantially affected a defendant's constitutional rights. Given such a Constitutional deprivation, the courts' "after-the-fact" second guessing as to what the jury could have possibly found cannot be held to be an adequate substitute for a defendant's due process rights, or any other Constitutional rights for that matter.

The pattern for review of *Apprendi* claims, as set out in *Cotton*, suggests that the "integrity of the court proceeding" take precedent over a defendant's Constitutional rights, through permitting the courts to use a totally subjective standard to simply erase constitutional deprivations. Given the argument above, it is respectfully submitted that such a practice should not prevail, as it cannot be reconciled with the provisions of the Constitution.

2. **The Eleventh Circuit's conclusion regarding the existence of "plain error" was contrary to the Supreme Court's holding in United States v. Cotton, as well as Eleventh Circuit precedent.**

Irrespective of the above argument, Petitioner also asserts that the Eleventh Circuit's conclusions were erroneous, as there existed no evidentiary analysis to support the finding that "plain error" did not exist.

The Eleventh Circuit has held that *Apprendi* is implicated only when a judge-decided fact actually increases a defendant's sentence beyond the prescribed statutory maximum penalty for the crime of conviction and has no application to, or effect on, cases where a defendant's sentence falls at or below the maximum penalty. *See* **United States v. Sanchez**, 269 F.3d 1250, 1288 (11th Cir. 2001). The Eleventh Circuit has also recognized that where an *Apprendi* violation exists, a reviewing court must engage in a harmless error analysis. *See, e.g.*, **United States v. Anderson**, 289 F.3d 1321, 1326 (11th Cir. 2002). In *Anderson*, the Eleventh Circuit summarized the precedent with respect to the harmless error analysis of an *Apprendi* violation:

> "An *Apprendi* error does not require reversal of the sentence if that error is harmless. *See Sanchez*, 269 F.3d at 1272-75....Because *Apprendi* errors are subject to harmless error review, they can provide no relief to the sentenced defendant if they are 'harmless beyond a reasonable

> doubt.' *Candelario*, 240 F.3d at 1307 (quoting **Chapman v. California**, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967)).
>
> In the context of drug quantity, 'we must affirm [the] sentence if the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity.' *Nealy*, 232 F.3d at 830. Our en banc decision in *Sanchez* clearly endorsed the use of harmless error analysis in this context. *See Sanchez*, 269 F.3d 1250, 1271-72 n.4 (explicitly reaffirming holdings of, *inter alia*, *Nealy*, *Candelario*, and *Swatzie*). Simply put, the failure to charge or submit to the jury a specific drug quantity is harmless error under *Apprendi* if, by finding the defendant guilty, the jury necessarily must have found, beyond a reasonable doubt, that a certain quantity of drugs was involved in the offense. Put differently, if no reasonable juror could have found the defendant guilty without also finding that the specific quantity of drugs was involved, then the defendant is not entitled to a resentencing."

Anderson, 289 F.3d at 1326-27.

Instead of citing to any of the cases above, or any other Eleventh Circuit precedent, and without any evidentiary analysis, the Panel decision referred only to

one sentence from the decision in *Cotton*, to wit: "that there was no basis for concluding that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, because the evidence on that relevant matter was overwhelming and essentially uncontroverted." [Opinion: 16].

The decision in *Cotton* does not eliminate the need for evidentiary analysis, but appears to reinforce it. *Cotton* establishes that, where an *Apprendi* error is recognized, and "plain error" analysis is applied, the reviewing court must consider the weight of trial evidence bearing on the omitted element. Only after such a consideration of the evidence, and only if the evidence is "overwhelming" and "essentially uncontroverted," then it can be said that there is "no basis for concluding that the error 'seriously affects the fairness, integrity of public reputation of judicial proceedings.'" *Cotton*, 122 S. Ct. at 1786 (quoting *Johnson*, 520 U.S. at 470).

Therefore, under Eleventh Circuit precedent, with support from *Cotton*, the inquiry becomes whether it was clear, beyond a reasonable doubt, "that no reasonable juror could have found the defendant guilty without also finding that the specific quantity of drugs was involved." *Anderson*, 289 F.3d at 1326-27. A look at the record in this case does not support such a finding.

Petitioner was not convicted of any substantive act involving "crack" or powder cocaine. While Petitioner was convicted of marijuana possession, in Count 73, this is not indicative of a sentence over

twenty years being applicable, as the entire marijuana conspiracy, said to be more than 50 kilograms, still falls within 21 U.S.C. §841(b)(1)(C). In fact, other than Count 73, all other substantive counts were either dismissed by the government or subject to "not guilty" verdicts. The dismissal of, and acquittal on, these substantive counts was for one reason - lack of sufficient evidence.

As such, and given there was no specific finding of any quantity of "crack" involved in the conspiracy, this case is clearly distinguishable from **United States v. Candelario**, 240 F.3d 1300, 1307 (11th Cir. 2001), and **United States v. Swatzie**, 228 F.3d 1278 (11th Cir. 2000). It is clear that the jury never made any finding, beyond a reasonable doubt, in regard to any quantity of any drug in any count of the Indictment. It is also clear that Petitioner mounted a serious dispute as to the quantity of "crack" cocaine attributed to him at sentencing. While Petitioner argued that the evidence, at best, pointed to less than one ounce of "crack" cocaine being dealt between Cedric Jones and himself, the district court, based only on presumptions as to drug amount, overruled Petitioner's arguments.

With the specific drug amount being clearly undetermined under the law set forth in *Apprendi, supra*, and **United States v. Rogers**, 228 F.3d 1318, 1327 (11th Cir. 2000), there existed no supportable basis to extend Petitioner's sentence over the prescribed 20-year maximum in §841(b)(1)(C). The imposition of the "life" sentence, based only on the district courts presumptions as to the drug amount, and significantly more severe than the applicable maximum calls for,

was an error which did affect the fairness and integrity of Petitioner's sentencing. *See e.g.*, **United States v. Williamson**, 183 F.3d 458, 464 (5th Cir. 1999); **United States v. Kroeger**, 229 F.3d 700, 702 (8th Cir. 2000). The same is true even if Petitioner's three "offenses of conviction" are stacked together. As the two marijuana counts could only amount to a statutory maximum of ten years (five years each, under §841(b)(1)(C)), when combined with the "crack" maximum sentence of twenty years, the total sentencing exposure possible is thirty years. This is still significantly less severe than "life".

The evidence as to Petitioner's guilt, let alone for a determination of foreseeable drug quantity, was far from "overwhelming". Additionally, with Petitioner arguing that he should not be responsible for anything over one ounce of crack, it cannot be said that the drug quantity was "essentially uncontroverted". Finally, while the practice at sentencing may have been proper, at that time, it was clearly improper before the time the case became final. The case law and procedural rules clearly afford avenues for relief in such situations.

Given the arguments above, Petitioner asserts that the "plain error" test **does** establish that the "*Apprendi* error" occurred, that it affected his substantial rights, and that it **did** affect the fairness of the judicial proceedings. As such, it is respectfully submitted that this Honorable Court must exercise its authority to fashion relief. To do otherwise, thereby upholding such an erroneous sentence, especially in the wake of Supreme Court authority, controlling circumstances, and interpretative precedent in the

Eleventh Circuit, and other Circuits as well, would rock the very foundation of the terms "fairness", "integrity", or "public reputation".

CONCLUSION

The aforementioned errors create a serious question of confidence in the outcome of Petitioner's trial, conviction, and sentence. If confidence in the outcome of a trial is questioned, the matter should be remanded for further proceedings, whether that be for a new trial, or for the imposition of the statutory maximum sentence of twenty (20) years. To do anything different would be a miscarriage of justice.

Regardless of what the Eleventh Circuit determined the the jury might have found, regarding the drug quantity, the fact remains that no drug-quantity determination was reached by the jury, nor was the drug quantity established beyond a reasonable doubt. As such, Petitioner's sentence was imposed in violation of the Constitution and laws of the United States protecting him. This court must reconcile the conflicts presented with *Apprendi* and *Cotton* to avoid making meaningless constitutionally protected rights.

WHEREFORE, Petitioner prays this Honorable Court will grant the present request, and grant the Writ of Certiorari.

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[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6008

D.C. Docket No. 97-00099-CR-15

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHRIS LIPSCOMB,
WILMER KEITH BRECKENRIDGE, et al.,
Defendants-Appellants

No. 98-6490

D.C. Docket No. 97-00099-CR-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERALD L. JONES,
a.k.a. Tommy,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Alabama

Filed: September 4, 2002
Entered: September 4, 2002

Before TJOFLAT, WILSON, AND COWEN[1], Circuit Judges.

PER CURIUM:

Arthur Reginald Tramble, Thelbert C. Stanton, Gerald L. Jones, Wilmer Keith Breckenridge, and Chris Lipscomb appeal the convictions and sentences they received. They assert various claims on appeal. Those include constitutional issues, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), issues, sentencing issues, and various trial issues.

BACKGROUND

On June 18, 1997, a seventy-five count superseding indictment was filed, charging the appellants in this case and thirty-one other codefendants with various drug offenses. The defendants were divided into three groups for trial, and the appellants in this case were tried together. Lipscomb and Tramble were convicted of conspiracy to possess cocaine with the intent to distribute in violation

[1] Honorable Robert E. Cowen, U.S. Circuit Judge for the Third Circuit, sitting by designation.

of 21 U.S.C. § 846; Staten was convicted of conspiracy to possess crack cocaine with the intent to distribute in violation of § 846; Breckenridge was convicted of conspiracy to possess **[3]** crack cocaine with the intent to distribute in violation of § 846, conspiracy to possess marijuana with the intent to distribute in violation of § 846, and possession of marijuana with the intent to distribute in violation of 21 U.S.C. § 841(a)(1); and Jones was convicted of conspiracy to possess cocaine with the intent to distribute in violation of § 846, conspiracy to possess marijuana with the intent to distribute in violation of § 846, two counts of attempt to possess cocaine with the intent to distribute in violation of § 846, and attempt to possess marijuana with the intent to distribute in violation of § 846.[2] The defendants appeal their sentences and convictions.

DISCUSSION

I. Perjured Testimony and the Indictment

Tramble argues that the district court erred in failing to dismiss the indictment, because it was based upon the perjured testimony of a grand jury witness. He asserts that Special Agent Tony Calderaro committed perjury when he testified that Tramble "in the past rented cars for couriers." He bases his allegations upon the government's failure to connect him to more than one car **[4]** rental at trial.

"[We ha[ve] indicated that the possibility that a witness may have given false testimony before the

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[2] The defendants were found not guilty on all of the other counts that had not been dismissed by the government

grand jury does not automatically vitiate an indictment based on that testimony . . . ." *United States v. Garate-Vergara*, 942 F.2d 1543, 1550 (11th Cir. 1991). To have an indictment dismissed, the defendant must establish perjury or government misconduct and prejudice. *Id.*

The full transcript of the grand jury proceedings is not in the record on appeal, but it appears as if Agent Calderaro's statement does not comprise the only evidence against Tramble. Agent Calderaro testified that Tramble was an associate of the Jones organization, there was a tape recorded drug transaction between Cedric Jones and Tramble, and at least one car rental by Tramble was established by the evidence. In addition, there is no indication that Agent Calderaro willfully pluralized the word "car". *See* 18 U.S.C. § 1621(1)(noting that perjury occurs when one "willfully and contrary to [an] oath states or subscribes any material matter which he does not believe to be true").

As Tramble cannot show perjury or prejudice, we cannot overturn the indictment.

II. Variance Between Evidence at Trial and Evidence Before Grand Jury

A. Staten and Lipscomb

[5] Staten and Lipscomb assert that there was a material variance between the evidence presented at trial and the evidence presented before the grand jury. They assert that the indictment charged only one

conspiracy, while the evidence at trial showed that there were multiple conspiracies.

To show a variance that warrants reversal, the defendant must show that the variance "was material" and that the variance "substantially prejudiced the defendant." *United States v. Reed*, 980 F.2d 1568, 1581 (11th Cir. 1993)(internal quotation marks omitted). We review the claim of a material variance by "view[ing] the evidence in the light most favorable to the government and ask[ing] whether a reasonable trier of fact could have found that a single conspiracy existed beyond a reasonable doubt." *Id.* In proving a single conspiracy, the government need not prove that Staten and Lipscomb knew all of their coconspirators. *United States v. Saget*, 991 F.2d 702, 712 (11th Cir. 1993); *United States v. Orr*, 825 F.2d 1537, 1543 (11th Cir. 1987). Rather, the factors considered are as follows: "[(1)]was there a common goal; [(2)] what was the nature of the criminal scheme; and [(3)] what was the overlap of the participation in the various dealings of the conspiracy." *United States v. Chastain*, 198 F.3d 1338, 1349 (11th Cir. 1999)(footnote omitted).

In light of the evidence presented against Staten and Lipscomb, a reasonable **[6]** fact finder could have found that they were involved in a large conspiracy. In addition, the district court specifically instructed the jury regarding multiple conspiracies. As a result, if there were any prejudice to them, it likely was cured by the instruction. *See United States v. Pena-Rodriquez*, 110 F.3d 1120, 1128-29 (5th Cir. 1997).

B. Tramble

Tramble asserts that his constitutional rights were violated, because the government produced evidence against him at trial that was not produced before the grand jury. He bases his argument upon the testimony of Cedric Jones and Fritz Paul, former codefendants whom he characterizes as liars. We must review this challenge for plain error, because it was not raised before the district court. *United States v. McDowell*, 250 F.3d 1354, 1362 (11th Cir. 2001). In order to reverse his sentence upon a finding of plain error, we must find "an error that is plain and that affect[s] substantial rights" and that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993)(alterations in original) (internal quotation marks omitted).

Tramble does not provide any support for his argument, and, in fact, the testimony of his coconspirators was admissible. *See United States v. Rosenthal*, [7] 793 F.2d 1214, 1240-41 (11th Cir.), *modified on other grounds by* 801 F.2d 378 (11th Cir. 1986)(The testimony of a codefendant through a plea agreement is admissible). In addition, the government is allowed to introduce evidence at trial that is discovered after the indictment. *See Saget*, 991 F.2d at 708 (noting that the denial of a continuance for additional time to prepare to address new evidence "must be upheld unless the defendant can show an abuse of discretion" and that there was "substantial prejudice").

Thus, the district court did not err in failing to dismiss the indictment with respect to Tramble.

III. Writ of Habeas Corpus Ad Testificandum

Tramble asserts that the district court erred in denying his petition for a writ of habeas corpus ad testificandum for Leon Tollette, because Tollette's testimony would have rebutted the evidence presented against him.

The denial of a petition for a writ of habeas corpus ad testificandum "is committed to the sound discretion of the district court." *United States v. Wright*, 63 F.3d 1067, 1070 (11th Cir. 1995). The following standard applies to this issue:

> In addition to requiring the defendant to make the Rule 17(b) showings that he is unable to pay the fees of the witness and that the presence of the witness is necessary for an adequate defense, the court should also consider whether the prisoner's presence will substantially further the resolution of the case, what security risks are **[8]** presented by permitting the prisoner to come to court to testify, what the expense of the prisoner's transportation and upkeep will be, and other factors bearing on the need for the prisoner's testimony vis-a-vis the difficulties attendant to securing it.

United States v. Rinchack, 820 F.2d 1557, 1567-68 (11th Cir. 1987)(citations omitted).

Tramble's proffer of Tollette's testimony showed that Tollette's testimony would not have rebutted the evidence presented at trial. The proffer indicated that Tollette would testify that he was not involved in drug transactions with Tramble and that Edie Melendez, his girlfriend, never delivered cocaine to Tramble. This is not contrary to the evidence, however, because the government's witnesses never asserted that Tramble was involved in that way with Tollette and Melendez. Although Tramble implies that Tollette would have testified that Tramble was not aware that Tollette took cocaine in the rental car he borrowed from Tramble, there is nothing in the proffer about the rental car incident.

In addition, the court took the practical and security problems regarding the transportation of Tollette into account. Tollette was incarcerated in Georgia on capital murder charges, so additional security would have been required.[3] Also, Tollette's trial was scheduled to begin within three weeks, and his attorney **[9]** objected to the writ.

Thus, the district court did not abuse its discretion in denying the petition for the writ.

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[3] The Georgia authorities stated that Tollette was "extremely dangerous" and would love to use this opportunity to attempt to escape.

IV. Sufficiency of the Evidence

The defendant's challenge their convictions based upon the sufficiency of the evidence. We review a "challenge to the sufficiency of the evidence *de novo*." *United States v. Williams*, 144 F.3d 1397, 1401 (11th Cir. 1998). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). All reasonable inferences and credibility determinations are made in favor of the jury's verdict. *See United States v. Diaz*, 248 F.3d 1065, 1084 (11th Cir. 2001).

To support a conspiracy to distribute a controlled substance conviction, the government must prove the following beyond a reasonable doubt: (1) there was a conspiracy; (2) the defendants "knew of the essential objectives of the conspiracy;" and (3) the defendants "knowingly and voluntarily participated in the conspiracy." *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997).

[10] A. Staten

Staten contends that there was insufficient evidence to show that he participated in the conspiracy, because he merely had a buyer-seller relationship with Cedric Jones.

While "the existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement," *United States*

v. Bascaro, 742 F.2d 1335, 1359 (11th Cir. 1984), the evidence in this case did not show that Staten merely made isolated purchases. In fact, it showed that Staten made consistent purchases of crack for resale from Cedric Jones on at least a weekly basis for over one year. From this relationship, the jury could have inferred that Staten was a part of the conspiracy. *See United States v. Mercer*, 165 F.3d 1331, 1335 (11th Cir. 1999)(per curiam)(noting that a conspiracy "agreement may be inferred when the evidence shows a continuing relationship that results in the repeated transfer of illegal drugs to the purchaser").

Thus, there was sufficient evidence to support Staten's conviction.

B. Jones, Breckenridge, and Tramble

Jones, Breckenridge, and Tramble assert that there was insufficient evidence against them to support their convictions, because their convictions were based upon the testimony of former codefendants whose credibility was questionable. **[11]** This argument fails, however, because the "uncorroborated testimony of an accomplice is sufficient to support a conviction . . . if it is not on its face incredible or otherwise in substantial." *United States v. LeQuire*, 943 F.2d 1554, 1562 (11th Cir. 1991). "For a witness's testimony to be incredible or insubstantial on its face, it must be testimony as to facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature." *Id.* (alteration in original)(internal quotation marks omitted).

Thus, there was sufficient evidence to support their convictions.

C. Lipscomb

Lipscomb asserts that the evidence against him was insufficient, because the district court noted that Paul, a former codefendant who testified against Lipscomb, was "an incredible witness whom the jury could not believe." The court, however, made this statement while denying Lipscomb's motion to strike Paul's testimony on credibility grounds. As this argument concerns credibility **[12]** issues, we must make all credibility determinations in favor of the jury's verdict. *See Diaz*, 248 F.3d at 1084; *see also Hewitt*, 663 F.2d at 1385 (noting that the jury is free to believe witnesses even if they are "scoundrels, liars and brigands" (internal quotation marks omitted)). Thus, there was sufficient evidence to support Lipscomb's conviction.

V. Hearsay Testimony

Tramble asserts that the district court erred in admitting the testimony of Melendez. We review this challenge for plain error, because it was not raised before the district court. *McDowell*, 250 F.3d at 1362. In order to reverse his sentence upon a finding of plain error, we must find "an error that is plain and that affect[s] substantial rights" and that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alterations in original) (internal quotation marks omitted).

Melendez testified that she learned form Tollette that he had been chased by the police in Uniontown and had thrown away drugs that he was able to retrieve.[4] Her statements were supported by other testimony presented at trial regarding what occurred that day. Thus, we find no plain error in the district court's admission of Melendez's testimony.

[13] VI. Motion for a New Trial

Breckenridge asserts that the district court abused its discretion in denying his motion for a new trial.

We review the denial of a motion for a new trial for abuse of discretion. *United States v. Michael*, 17 F.3d 1383, 1384 (11th Cir. 1994).

If a defendant requests a new trial based upon newly discovered evidence, the defendant

> must establish that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

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[4] This incident occurred when Tollette was using a rental car he borrowed from Tramble.

United States v. Schlei, 122 F.3d 944, 991 (11th Cir. 1997). "[F]ailure to satisfy any one of these elements is fatal to a motion for new trial." *United States v. Lee*, 68 F.3d 1267, 1274 (11th Cir. 1995).

To obtain a new trial based upon a violation of the government's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), the defendant must show

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) the the prosecution suppressed the **[14]** favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

United States v. Meros, 866 F.2d 1304, 13008 (11th Cir. 1989)(per curiam)(citations omitted).

As Breckenridge cannot satisfy these standards with respect to the evidence he presented, we cannot hold that the district court abused its discretion in denying his motion for a new trial.

VII. Prosecutorial Misconduct

We review claims of prosecutorial misconduct de novo. *United States v. Edenfield*, 995 F.2d 197, 200 (11th Cir. 1993). "For a prosecutor's remarks to offend due process, the remarks must be improper and a reasonable probability must exist that, but for the offending remarks, the defendant would not have been convicted." *United States v. Rodgers*, 981 F.2d 497, 499 (11th Cir. 1993)(per curiam). We have noted that "[o]ur cases have recognized that in the rarest and most outrageous circumstances government conduct might violate that fundamental fairness, shocking to the universal sense of justice mandated by the due process clause of the fifth amendment," *Edenfield*, 995 F.2d at 200 (internal quotation marks omitted), and "that prosecutorial misconduct may be rendered harmless by curative instructions to the jury," *United States v. Herring*, 955 F.2d 703, 710 **[15]** (11th Cir. 1992).

Breckenridge, Lipscomb, and Jones assert that there were several instances of prosecutorial misconduct in this case that warrant reversal. We disagree and therefore decline to reverse based upon those grounds.

VIII. *Apprendi* Issues

As the defendants raise their *Apprendi* claims for the first time on appeal, we review them only for plain error. *United States v. Sanchez*, 269 F.3d 1250, 1280 (11th Cir. 2001)(en banc), *cert. denied*, __U.S.__, 122 S.Ct. 1327 (2002). In order to reverse their sentences upon a finding of plain error, we must find "an error that is

plain and that affect[s] substantial rights" and that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alterations in original) (internal quotation marks omitted).

The defendant's challenge their sentences based upon *Apprendi*, because drug quantity was not an issue found beyond a reasonable doubt by the jury. The defendants also assert that their sentences are unconstitutional, because specific drug quantities were not alleged in the indictment.

In Apprendi, the Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable **[16]** doubt." 530 U.S. at 490. Under § 841, the lowest statutory maximum sentence for an offense involving powder or crack cocaine without regard to quantity is twenty years of imprisonment. 21 U.S.C. § 841(b)(1)(C). both Lipscomb and Staten were sentenced below that maximum; Lipscomb was sentenced to eleven years and four months of imprisonment, and Staten was sentenced to fifteen years and eight months of imprisonment. As we have that "*Apprendi* has no effect on cases in which a defendant's actual sentence falls within the range prescribed by the statute for the crime of conviction," *Sanchez*, 269 F.3d at 1268, there was no violation of *Apprendi* with respect to Lipscomb and Staten.

The other three defendants, Breckenridge, Jones, and Tramble, were not sentenced within the twenty-year statutory maximum. Thus there was *Apprendi* error. Those defendant's cannot show plain error in this case. In *United States v. Cotton*, the United States Supreme Court "held that there was no basis for concluding that the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," because the evidence on that relevant matter "was overwhelming and essentially uncontroverted." __U.S.__, 122 S.Ct. 1781,1786 (2002)(alteration in original)(internal quotation marks omitted). In addition, the Court held, "The same analysis applies . . . to the omission of drug quantity from the indictment. *Id.*

[17] Thus, the defendant's claims regarding the failure of the jury to find quantity beyond a reasonable doubt and the failure to allege a specific quantity in the indictment fail, because they cannot show plain error.

IX. Constitutionality of §§ 841 and 846

A. Facial Attack

Lipscomb, Staten, Jones, and Breckenridge assert that §§ 841 and 846 are facially unconstitutional, and, as a result, they argue that their convictions cannot stand.

To facially attack a statute's constitutionality successfully, a defendant must show that there are no circumstances under which the statute would be valid. *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir.

2000). A defendant, however, cannot succeed if the statute has been interpreted by the courts in a way that makes it constitutional. *Agan v. Vaughn*, 119 F.3d 1538, 1544 (11th Cir. 1997).

We have rejected constitutional challenges to §§ 841 and 846 in the past. *See United States v. Candelario*, 240 F.3d 1300, 1311 n.16 (11th Cir.), *cert. denied*, 533 U.S. 922 (2001); *see also United States v. Martinez*, 253 F.3d 251, 256 n.6 (6th Cir. 2001); *United States v. Brough*, 243 F.3d 1078, 1079-80 (7th Cir.), *cert. denied*, __U.S.__, 122 S.Ct. 203 (2001). As there are circumstances **[18]** under which §§ 841 and 846 are constitutional, these defendants cannot show that the statutes are facially unconstitutional.

B. Mens Rea Requirement for Drug Quantity and Type

Lipscomb, Staten, Jones, and Breckenridge also assert that §§ 841 and 846 are unconstitutional, because they do not require a specific mens rea regarding drug quantity and type. We must review this challenge for plain error, because it was not raised before the district court. *McDowell*, 250 F.3d at 1362. In order to reverse their sentences upon a finding of plain error, we must find "an error that is plain and that affect[s] substantial rights" and that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alterations in original) (internal quotation marks omitted).

Although we have not addressed this issue, other circuits have held that the federal drug statutes require only that a defendant knowingly and willfully possess a controlled substance and do not require knowledge of the amount or type possessed. *See, e.g., United States v. Garcia*, 252 F.3d 838, 844 (6th Cir. 2001); *United States v. Sheppard*, 219 F.3d 766, 768 n.2 (8th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). Thus we find no plain error. *See United States v. Gerrow*, 232 F.3d 831, 835 (11th Cir. 2000)(per curiam), *cert. denied*, __U.S.__, 122 S.Ct. 75 (2001)(Where we have no precedent on an issue and other **[19]** circuits have rejected the contention, there is no plain error.).

X. Sentencing Issues

"We review the district court's application of the Sentencing Guidelines *de novo*, and its findings of fact for clear error." *United States v. Wilson*, 183 F.3d 1291, 1300 n.1 (11th Cir. 1999).

A. Role Reduction

Tramble, Staten, and Lipscomb assert that the district court erred in failing to reduce their sentences pursuant to U.S.S.G. § 3B1.2.

We review a district court's determination of whether a defendant qualifies for a role reduction for clear error. *United States v. Rodriquez De Varon*, 175 F.3d 930, 937 (11th Cir. 1999)(en banc). The sentencing guidelines provide for a two-level adjustment if the defendant is a minor participant. U.S.S.G. § 3B1.2(b). A minor participant is any participant "who is less

culpable than most other participants, but whose role could not be described as minimal." *Id.* § 3B1.2, cmt. n.5.

The determination of the defendant's role is dependent upon the facts of the case. *Rodriquez De Varon*, 175 F.3d at 940. In making this factual determination, the district court must "[f]irst and foremost . . . measure the defendant's role against the relevant conduct for which she has been held accountable." *Id.* The **[20]** district court also may "measure the defendant's culpability in comparison to that of other participants in the relevant conduct." *Id.* at 944.

1. Tramble and Lipscomb

Tramble and Lipscomb assert that the district court erred in failing to grant them a two-level minor-role reduction. They, however, provide us with no references to the record that show that they played a minor role in the conspiracy. In fact, the evidence presented at trial showed that they were involved in numerous transactions that resulted in the distribution of large quantities of cocaine. As a result, we cannot find that the district court clearly erred in denying their requests for a reduction.

2. Staten

The district court granted Staten a two-level minor-role reduction, but Staten asserts that the district court erred because it should have granted him a three- or four-level minimal-role reduction pursuant to

section 3B1.2(a) or (b). He asserts that his buyer-seller relationship with Cedric Jones indicates that he merely was a minimal participant. The evidence at trial, however, showed that Staten was involved in numerous transactions that resulted in the distribution of over 1.5 kilograms of crack cocaine. As a result, we cannot find that the district court clearly erred in denying Staten's request for a reduction.

[21] B. Role Enhancement

Jones appeals the district court's enhancement of his sentence under U.S.S.G. § 3B1.1(a). We review the district court's determination of the defendant's role in the offense for clear error. *United States v. Garrison*, 133 F.3d 831, 843 (11th Cir. 1998). The government must prove the existence of an aggravating role in the offense by a preponderance of the evidence. *United States v. Yates*, 990 F.2d 1179, 1182 (11th Cir. 1993)(per curiam). If the probation officer and the prosecutor assert that an enhancement is warranted, "they must be prepared to establish that pertinent information by evidence adequate to satisfy the judicial skepticism aroused by the lengthier sentence that the proffered information would require the district court to impose." *United States v. Lawrence*, 47 F.3d 1559, 1567 (11th Cir. 1995)(internal quotation marks omitted).

Under section 3B1.1(a), a defendant's base offense level may be enhanced by four levels if he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). "To qualify for an adjustment under this section, the defendant must

have been the organizer, leader, manager, or supervisor of one or more other participants." *Id.* § 3B1.1, cmt. n.2. The defendant need not be the only leader for this enhancement **[22]** to apply. *See United States v. Revel*, 971 F.2d 656, 660 (11th Cir. 1992).

The government presented the following evidence regarding Jones' role in the conspiracy: (1) he provided California suppliers with a car trailer to aid them in smuggling drugs into Alabama; (2) he possessed receipts for 106 money orders, totaling more than $40,000; (3) he recruited a driver to transport cocaine from California to Alabama in a van registered in his name; (4) he supplied his coconspirators with cocaine for distribution in Alabama and coordinated with California suppliers to get his coconspirators drugs; (5) he had large amounts of cash in his possession on several occasions; and (6) he participated in several recorded telephone conversations in which he discussed drug transactions. This evidence clearly showed that he played the role of a leader or organizer. In addition, the evidence clearly showed that more than five individuals were involved in the conspiracy. As a result, we cannot find that the district court erred in imposing the enhancement.

C. Firearm Possession Enhancements

1. Enhancements

Tramble and Jones contend that the district court erred in imposing a two-level increase for possession of a weapon by a coconspirator pursuant to U.S.S.G. § 2D1.1(b)(1).

[23] Section 2D1.1(b)(1) provides that "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels." *Id.* This enhancement should be applied "unless it is clearly improbable that the weapon was connected with the offense." *Id.* § 2D1.1, cmt. n.3. The government must show the following: "(1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of possession, *and* (4) the co-conspirator possession was reasonably foreseeable by the defendant." *United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir. 1999).

The district court found that it was reasonably foreseeable to Tramble that Cedric Jones, a coconspirator, would possess a firearm. Tramble asserts that the possession was not reasonably foreseeable and that he did not have adequate notice of the enhancement because the presentence investigation report (PRESENTENCE REPORT) based the enhancement upon the possession of George Allums. The PRESENTENCE REPORT, however, recommended the enhancement because various coconspirators possessed weapons. In addition, at trial, Tramble testified that he knew Cedric Jones possessed a firearm and brandished it on occasion. Thus, as there is nothing to suggest that it was improbable that Cedric Jones' possession was related to the conspiracy, we cannot hold that the district court erred in imposing the **[24]** enhancement with respect to Tramble.

The district court failed to make a foreseeability finding with respect to Jones. As the government concedes that remand is necessary, we remand this case to the district court for the limited purpose of making a finding with respect to whether Jones's coconspirators' possession was reasonably foreseeable.

2. *Apprendi* Issue

Tramble asserts that the firearm enhancement violates *Apprendi*, because the possession of a weapon by a coconspirator was not alleged in the indictment. We have held, however, that "*Apprendi* does not apply to judge-made determinations pursuant to the Sentencing Guidelines." *Sanchez*, 269 F.3d at 1262. As a result, the district court did not violate Apprendi when it imposed the firearm enhancement.

D. Drug Calculations

We review the district court's calculation of drug quantity for clear error. *United States v. Simpson*, 228 F.3d 1294, 1298 (11th Cir. 2000). In calculating the quantity, it is important to note that a defendant is liable for his acts and the acts of his coconspirators that are reasonably foreseeable and in furtherance of the activity he agreed to undertake. *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993); *see also United States v. Chisolm*, 73 F.3d **[25]** 304, 308-09 (11th Cir. 1996)(holding that the district court erred in concluding that the conversion of the powder cocaine into crack cocaine was an act attributable to the defendant as there was no evidence to show that the conversion of powder cocaine to crack cocaine was

reasonably foreseeable). A district court must make findings regarding the scope of the activity the defendant undertakes and whether the quantity was reasonably foreseeable. *Ismond*, 993 F.2d at 1499. If the court fails to do so, however, we still can uphold the sentence "if the record supports the amount of drugs attributed to [the] defendant." *Id.*

1. Lipscomb and Jones

Lipscomb was sentenced on the basis of 56.7 grams of crack cocaine. He asserts that crack should not be counted as relevant conduct, because he was convicted for his involvement in a "cocaine" conspiracy. Jones makes a similar argument. Jones was sentenced on the basis of 1.5 kilograms of crack cocaine. He asserts that the district court should not have attributed that quantity to him, because he was convicted of a cocaine charge.

It appears as if the district court did not make any determinations with respect to whether it was reasonably foreseeable to Lipscomb and Jones that the cocaine they were involved with would be converted into crack cocaine. We, however, find that the record supports a finding that the conversion of powder **[26]** cocaine into crack cocaine was reasonably foreseeable.

Thus, we cannot hold that the district court erred in calculating the drug quantity attributable to Lipscomb and Jones.

2. Tramble

Tramble asserts that the district court erred in attributing fifty kilograms of cocaine to him instead of 48.75 kilograms. He also asserts that the government relied upon the vague and uncertain testimony of two of his coconspirators in making its determination. The evidence at trial, however, showed that the conspiracy involved trafficking in much more than fifty kilograms of cocaine and that Tramble individually was responsible for at least fifty-one kilograms of cocaine. In addition, the court found that the evidence as to drug quantity was credible. Thus, we cannot hold that the district court erred in calculating the drug quantity attributable to Tramble.

3. Breckenridge

The district court found that 1.5 kilograms of crack cocaine were attributable to Breckenridge. Breckenridge, however, argues that this finding was erroneous, because it was based upon the uncorroborated testimony of his coconspirators. The evidence at trial, however, showed that Cedric Jones distributed at least 6.5 kilograms to Staten while Breckenridge was protecting him. **[27]** Thus, the court did not err in calculating the quantity of crack cocaine attributable to Breckenridge.

E. Disparity Between Crack and Powder Cocaine

Jones and Breckenridge assert that the disparate treatment of crack cocaine and powder cocaine under the sentencing guidelines violates their Fifth and

Eighth Amendment rights, and, as a result, they argue theat they are entitled to downward departures.

We have held that the disparity between crack cocaine and powder cocaine does not violate the Fifth Amendment nor the Eighth Amendment. *United States v. Vasquez*, 121 F.3d 622, 622 (11th Cir. 1997)(per curiam); *United States v. Brazel*, 102 F.3d 1120, 1158 (11th Cir. 1997). Thus, the district court did not err in failing to depart from the guidelines in violation of Eleventh Circuit precedent.

XI. Ineffective Assistance of Counsel

Breckenridge asserts that he received ineffective assistance of counsel, because the district court held, in its ruling regarding newly discovered evidence, that certain evidence could have been discovered earlier with due diligence.

To succeed on his claim for ineffective assistance of counsel, Breckenridge "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). **[28]** In considering this claim, we presume that Breckenridge received effective assistance of counsel, and we "avoid second guessing with the benefit of hindsight." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992). Such claims, however, usually are not considered on direct appeal, because the record often is insufficient; they typically are reserved for a collateral attack in which an evidentiary hearing may be conducted. *United States v. Camacho*, 40 F.3d 349, 355 (11th Cir. 1994).

The record in this case is insufficient. Nothing in the record indicates whether Breckenridge's attorney made efforts to obtain the information earlier or what his reasoning was. Nor does the record show what part Breckenridge played in his attorney's failure to obtain the evidence. In *Strickland*, the Court noted that

> [t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

466 U.S. at 691.

As none of this information is available in the record, we will not consider **[29]** this issue on direct appeal.

CONCLUSION

Thus, we REMAND this case to the district court for the limited purpose of making a finding with respect to whether Jones's coconspirators possession was reasonably foreseeable. We AFFIRM the district court with respect to all of the other issues raised by the defendants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6008-II

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHRIS LIPSCOMB,
WILMER KEITH BRECKENRIDGE, et al.,
Defendants-Appellants

No. 98-6490-II

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERALD L. JONES,
a.k.a. Tommy,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

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Before: TJOFLAT, WILSON, and COWEN[5], Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Gerald Jones and Wilmer Breckenridge is DENIED.

ENTERED FOR THE COURT:

November 8, 2002

/s/ Honorable Charles R. Wilson]
UNITED STATES CIRCUIT JUDGE

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[5] Honorable Robert E. Cowen, U.S. Circuit Judge for the Third Circuit, sitting by designation.